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JOINT FIGHTING AGAINST CARTEL PRACTICES IN THE MEMBER STATES OF THE REGIONAL ECONOMIC ZONE

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Abstract:
In general term, cartel is considered as a form of agreement between competitors in a similar industry whose purpose is for maximizing profit only for the members of cartel. The competition authority of Indonesia, Commission for the Supervision of Business Competition (KPPU), is now vigorously fighting against cartel practices in various business fields. There are several principle considerations regarding the establishment of cartel, such as the mechanism of how the cartel works, how to reveal the cartel, and the impact for the competition as well as for the consumers. These understandings are needed in order to handle cartel practices appropriately, both from the aspect of prevention as well as law enforcement. Preventive action is carried out by establishing rules and policies whose purpose is for giving a limitations regarding the permissible or impermissible actions when the business actors of similar business gather, as is usually organized by any trade associations. Repressive action, as an action to make deterrent effect, can be executed by penalizing them a significant fine, even by a criminal threat. Most of all countries that are doing an action to fight against cartel will face various obstacles and challenges in order to overcome this practice. The states which are incorporated in a regional economic zone, such as Association of Southeast Asian Nations (ASEAN), have performed a cooperative action that agrees together to fight against cartel. This cooperation is executed by doing strategic steps from the level of investigation, starting from detecting, doing a pre-investigation appraisal, investigation planning and resourcing, as well as making strategies for investigation progress and preparing written recommendations. One of the efforts in order to handle cartel practices which is regarded efficient enough is called leniency program, where the Indonesian parliament is still drafting it in the amendment of its Anti-Monopoly Law.

A. Introduction

Cartel activities in strategic sectors have been raising new issues recently in view of the mechanism by which cartels operate, the proving process, and the integrated approach in addressing cartels, both internally with regards to law enforcement agencies, as well as externally involving international cooperation. The mechanism of cartel operations is pointing towards one common feature, namely that cartels are conducted by business actors of similar types belonging to a trade association, for the purpose of maximizing profits based on written or tacit agreement. The existence of such tacit agreement can be considered as a new phenomenon in the proving process using indirect evidence or circumstantial evidence.

The objective of cartel practices is to maximize profits by way of influencing prices by making arrangements for the production and/or marketing of goods and/or services, thus leading to monopolistic practices and/or unfair business competition.[1] In general, the characteristics of cartel agreements are distinct from other trade restriction agreements, particularly with regards to their form, namely the former tend to be in the form of tacit agreements. Cartel members tend to pose limitations with the objective of generating supra competitive profits.[2]

Several decisions of the competition authority in Indonesia, namely Komisi Pengawas Persaingan Usaha (Commission for the Supervision of Business Competition, hereinafter briefly referred to as KPPU) concerning cooking oil cartel[3],

[1]Article 11 of Law No. 5/1999: Business actors shall be prohibited from entering into agreements with their business competitors, with the intention of influencing prices by arranging the production and or marketing of certain goods and or services, which can cause monopolistic practices and or unfair business competition. [Unofficial translation]

[2]Mario Monti, "Why should we be concerned with cartels and collusive behavior?", (Göteborg: Elanders Graphic Systems, 2001), p. 15.

[3]KPPU Decision in Case No. 24/KPPU-I/2009 concerning Cooking Oil Price Fixing.

fuel surcharge cartel[4], anti-hypertension medicine cartel[5], garlic cartel[6], car tyre cartel[7], poultry cartel[8], and imported beef cartel[9] have in all instances resulted in excessive prices and have thus unfavorably impacted consumers. Bearing in mind the impact of cartels, KPPU has been conducting supervision and law enforcement in accordance with Law Number Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as the Anti-Monopoly Law). It is line with the objective of the Anti-Monopoly Law, namely ensuring public interest and enhancing the efficiency of national economy as part of the endeavors to improve the people's welfare.[10]

The issue currently being faced by KPPU is when it decides to prove the existence of a collusive agreement by using indirect evidence. The reason for choosing the said mechanism for proving a cartel is, among things, the fact that such agreements are generally entered into tacitly. In addition, KPPU does not have the authority to conduct search and seizure of documents as an investigator would have. In several cases, the courts of law as the appeals judicature for KPPU decisions, found it difficult to accept indirect evidence which includes evidence of communication and economic proof, thus frequently leading to the cancellation of KPPU decisions KPPU in cartel cases.

Anti-cartel measures have been undertaken internally at the national level in the respective countries, as well as globally among member states of economic regions engaging in cooperation in combating cartels. Member states of the European economic region are an example of comprehensive cooperation, as they have a business competition authority for the territory of the European common market, namely the European Competition Commission (hereinafter referred to as ECC), which has supervisory and law enforcement functions. The said commission was established for the purpose of implementing Article 101 of the Treaty among member states of the European Union in effect since 1958, which is primarily aimed at regulating antitrust, mergers, cartels, and state aid.[11]

Law enforcement issues arising in view of cartel prohibitions in the European Union have been generally related to the high level of fines on the one hand and the application of immunity under the leniency program on the other.[12] Since its first

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[4]KPPU Decision in Case No. 25/KPPU-I/2009 concerning Fuel Surcharge Price Fixing in the Domestic Aviation Industry.

[5]KPPU Decision in Case No. 17/KPPU-I/2010 concerning the Class Therapy Pharmaceutical Industry for Amlodipine.

[6]KPPU Decision in Case No. 05/KPPU-I/2013 concerning the Violation of Article 11, Article 19 sub-article c and Article 24 of Law Number 5 Year 1999 concerning the Import of Garlic

[7]KPPU Decision in Case No. 08/KPPU-I/2014 Automotive Industry related to the Four-Wheeled Vehicles Tyre Cartel.

[8]KPPU Decision in Case No. 02/KPPU-I/2016 concerning the Alleged Violation of Article 11 of Law Number 5 Year 1999 related to the Regulation of Broiler Seedling Production.

[9]KPPU Decision in Case No. 10/KPPU-I/2015 concerning the Alleged Violation of Article 11 and Article 19 sub-article c of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition in the Trade of Imported Beef in Jakarta, Bogor, Depok, Tangerang, and Bekasi (Jabodetabek).

[10]Article 3 sub-article a) of Law No. 5/1999.

[11]Anonymous, "European Competition Policy", *Economics Online* (News Analysis Theory Comment) http://www.economicsonline.co.uk/Business_economics/European_competition_policy.html, accessed March 11, 2017.

[12]Alexander Italianer, "Fighting Cartels In Europe And The US: Different Systems, Common Goals", *Annual Conference of the International Bar Association (IBA)*, Boston, October 9, 2013.

Decision on cartels in 1969, the ECC has imposed a total of over €19 billion on 820 companies. The amount of fine has been calculated based on the percentage of the value of annual turnover of the company concerned, pursuant to the provisions in the Guidelines on Fines of 2006.[13]

The economic regional area covered by the Association of South East Asia Nations (hereinafter referred to as ASEAN) has stepped up economic cooperation within the ASEAN Economic Community (hereinafter referred to as AEC). The AEC has agreed to introduce business competition policies and legislation at the nation level in the respective member states by the year 2015, as well as to achieve the objectives of the ASEAN Economic Blueprint. Domestic as well as multinational companies conducting their business activities in the ASEAN region have been under constant pressure to comply with competition laws in the jurisdiction of the country in which they run their operations. It poses certain challenges on the companies concerned, considering the diverse business competition law provisions in each respective country.

ASEAN member states have taken a step towards strengthening cooperation in the field of competition policy and law by establishing the Experts Group on Competition (hereinafter AEGC). AEGC is a committee formed to oversee the development of competition law and policy in ASEAN. It is expected that by strengthening regional cooperation at the level of ASEAN competition authorities of member states will be able to share information concerning cartel and anti-competitive practices within such area. That being the case, companies are bound to face further challenges particularly in cartel investigations which are based on various different competition laws; for instance, not all member states have legal provisions concerning the Leniency Program, some jurisdictions treat it as criminal act. Faced with the diversity of the manner in which ASEAN countries deal with cartels, companies need to determine their compliance policy in each jurisdiction respectively, without constraining themselves by rigid implementation.[14] Based on the foregoing, the author has conducted a study on the prohibition of cartels, the impacts thereof, as well as the joint efforts for combating cartels undertaken by states in certain economic regions, specifically in ASEAN. Considering that dealing with cartels is a relatively new area of cooperation in the ASEAN region, the manner in which cartels are addressed and the form of cooperation among member states in this economic region need to be reviewed.

B. The Mechanism for Dealing with Cartels and Joint Efforts to Combat Cartels in Member States of an Economic Region

Economic cooperation at the level of ASEAN within the AEC includes several elements such as (i) a single market and production base, (ii) a highly competitive economic region, (iii) a region of equitable economic development, and (iv) a region fully integrated into the global economy. In the AEC Blueprint, competition policy is identified as the keyword for creating "a highly competitive economic region". Such objective is to be achieved gradually by the year 2015. Such accomplishment in the

[13]*Ibid*.

[14]Gerald Singham, et. al., "Competition Laws in ASEAN-Overview of The Main Prohibitions", *Competition Law Alert*, June 2013, *file:///C:/Users/anna%20maria/Downloads/Competition%20Law%20in%20ASEAN%20(2)*. Pdf, accessed March 5, 2017.

area of business competition is marked by the finalization of guidelines under the title Guidelines on Developing Core Competencies Policy and Law for ASEAN.[15] Chapter 3.2 of the said guidelines sets out the prohibition of anti-competitive agreements, among other things cartels. The discussion on efforts for combating cartels in member states in areas of economic regions consists of several sub-topics, namely 1) the reason for the need to combat cartel practices in strategic industries; 2) the legal mechanism for combating cartels in areas of economic regions; 3) potential challenges in establishing mechanisms for joint efforts for combating cartel practices.

1. The underlying rationale of the Prohibition of Cartels under Competition Policy and Law

Cartel practices are defined as "*A combination of producer of any product joined together to control its productions, sale and price, so as to obtain a monopoly and restrict competition in any particular industry or commodity*".[16] As the said definition suggests, cartel practices can be conducted by any producers and for any type of products, ranging from products for primary to tertiary needs. Cartel practices in any form are bound to end up in creating a condition that is harmful to consumers. Cartels prevent the opportunity for innovation or the entry of companies (new comers) which can offer better prices and services. Also, quite frequently cartel practices prevent other companies (new comers) from offering better production systems, which could potentially lead to more efficient (lower) prices. Cartels in general have the objective of obtaining excessive profits by determining supra competitive prices. In view of the massive impact of cartels, all business competition laws prohibit cartels; in fact, some countries treat it as a criminal act.

The prohibition of cartels is provided for in several articles, such as Article 5, Article 9, Article 11, and Article 22 of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Law No. 5/1999).[17] KPPU's decisions concerning cartel practices in several strategic sectors (such as garlic, tires for four-wheeled vehicles, poultry, import of beef, and even motor vehicles) catering to the needs of many people in the community indicate the same common pattern of behavior, namely that such agreements are entered into verbally and secretly within a trade association. The technique applied by KPPU to reveal and prove such agreements by using indirect evidence initially raised intensive debate among legal academic circles and observers; however, at the appeal level the District Court affirmed KPPU's Decision in the four-wheeled vehicle tyre cartel case. Indirect evidence was used in the absence of KPPU's authority to seize or search cartel related documents. Apart from the above, under the provisions prohibiting cartels in Law No. 5/1999 KPPU is obligated to use the rule of reason approach, which requires further economic analysis in order to prove whether or not there is excessive price or profit resulting in harm to consumers.[18]

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[15]Cassey Lee and Yoshifumi Fukunaga, "ASEAN Regional Cooperation on Competition Policy", ERIA Discussion Paper Series, *http://www.eria.org/ERIA-DP-2013-03.pdf*.

[16]Henry Campbell Black, M. A, Black's Law Dictionary (St. Paul, Minn.: West Publishing Co. 1968).

[17]Refer to Article 5, Article 9, Article 11 and Article 22 of Law No. 5/1999.

[18]OECD, "Prosecuting Cartels Without Direct Evidence", DAF/COMP/GF(2006)7, September 11, 2006, *https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf*, accessed 17 March 2017, "…Circumstantial evidence is employed in cartel cases in all countries. The better practice is to use circumstantial evidence holistically, giving it cumulative effect, rather than on an

Parallel to the development of handling cartels in Indonesia, ASEAN member states have also been making endeavors towards the establishment of cooperation in the fight against cartels. The embryo of cooperation in the area of competition policy and law was marked by, among other things, the establishment of the AEGC (ASEAN Experts Group on Competition).[19] ASEAN member states which had adopted the AEC Blueprint in 2007 made a commitment to promote competition policy and law in all ASEAN member states by the year 2015.[20] Further development of cooperation was marked by the establishment of Guidelines on Developing Core Competencies Policy and Law for ASEAN Regional Guidelines on Competition Policy in 2010 serving as a priority for AEGC.[21] Subsequently, at a meeting in Bangkok on November 28-29, 2012 the said document was finalized under the title Guidelines on Developing Core Competencies Policy and Law for ASEAN.[22]

For the purpose of implementing the above mentioned Regional Guidelines, member states agreed to articulate the same in the form of government policy in order to bring immediate impact on the conduct of companies and the structure of industry in the respective national markets. In principle, competition policy includes two primary elements; first, the adoption of a series of policies to promote competition; second, the adoption of legislation (in the form of laws, court decisions and implementing regulations) aimed at controlling or prohibiting anti-competitive practices.[23] The Regional Guidelines are based on the experience of individual countries as well as international best practices. Such Guidelines provide for various policy and institutional choices which can serve as guidelines for ASEAN Member States (hereinafter referred to as AMSs) in the context of endeavors towards creating an environment for fair business competition. The Guidelines are expected to raise awareness among AMSs about the significance of competition policy, aimed at encouraging development and enhancing cooperation among AMSs.

In general, the Guidelines set out provisions concerning the objective of establishing the guidelines, the benefits of competition policy, the scope of competition policy and law (hereinafter referred to as CPL), the role and responsibility of competition authorities, law enforcement powers, due process of law, technical assistance and capacity building, advocacy, and international cooperation in the area of competition in the context of free trade agreements (hereinafter referred to as FTAs). The Guidelines adopted in August 2010 provide for three primary prohibitions, namely (i) anticompetitive agreements; (ii) abuse of a dominant position; and (iii) anticompetitive mergers (and acquisitions). However, neither the EC

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item-by-item basis. Complicating the use of circumstantial evidence are provisions in national competition laws that variously define the nature of agreements that are subject to the law..."

[19]Anonymous, "ASEAN Experts Group on Competition", *http://www.asean-competition.org/aegc*, accessed March 16, 2017.

[20]Daren Shiau and Elsa Chen, "ASEAN Developments in Merger Control", *Journal of European Competition Law & Practice,* Vol. 5, No. 3, p. 149, 2014.

[21] ASEAN Secretariat, "ASEAN Regional Guidelines on Competition Policy", 2010. The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. "…The Member States of the Association are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. The ASEAN Secretariat is based in Jakarta, Indonesia..."

[22] The 6th ASEAN Competition Conference, 27-28 July 2016, Bangkok, Thailand. http://asean.org/asean-combat-cartels-region/ accessed 12 March 2017. See also M. Muchtar Rivai and Darwin Erhandy, "Kebijakan dan Hukum Persaingan Usaha Yang Sehat: Sinergitas Kawasan ASEAN di Era Globalisasi", ["Fair Business Competition Policy and Law: Synergy in the ASEAN Region in the Era of Globalization"], *Jurnal Liquidity*, vol. 2, No. 2, July-December 2013, p.199-200.

[23]ASEAN Secretariat, *Loc. Cit.*

Blueprint nor the ASEAN Regional Guidelines on Competition have a binding effect on the respective member states.[24]

2. Cartel Provisions in Members States of an Economic Region

There are significant distinctions between the European Union as an economic region and ASEAN, particularly viewed from the normative aspect. With regards to the European Union's normative effect, it is considered to be an agent of "Europeanization outside of the European Union", and as an endeavor to exercise political influence within its members states. In contrast to the above, ASEAN's normative role is regarded as a process of dialogue which focuses on the important role of negotiation and renegotiation. Unlike the European Union with its hegemonic approach, ASEAN appears to be reluctant to distance itself from the non-interference doctrine attaching to itself the title of "ASEAN Talk Shop". [25] Similarly, in the context of implementing competition policy and law, the European Union places greater emphasis on national law making through negotiations and understandings.

In dealing with cartels, each AMS prohibits anticompetitive agreements through various mechanisms, both from the aspect of regulatory framework as well as institutional powers. Cartel related provisions include several substantive CPL elements in each member state, namely provisions prohibiting cartels, the competence of competition authorities, and due process of law. Following is an overview of the distinctive features of cartel regulations in several ASEAN Member States.

The prohibition of cartels in Indonesia is covered by the criteria for prohibited agreements, which includes cartel prices (Article 5 and Article 11), non-price cartels (Article 4, Article 9 and Article 12), and conspiracy (Article 22 up to Article 24) of Law No. 5/1999. In dealing with cases of anti-competitive practices in Indonesia, bid rigging cases have dominated law enforcement statistics since the establishment of KPPU in 2000. Following is a diagram of the development KPPU decisions indicating a total of 189 decisions (70%) concerning bid rigging and a total of 80 decisions (30%) concerning non-bid rigging cases. In addition to bid rigging cases,[26] KPPU decisions include abuse of dominant position cases, as well as cases of other prohibited agreements such as exclusive dealing (tying or bundling), vertical integration, and cartel. Prominent hard-core cartel cases have come to public attention recently, as cartel agreements have been occur in important sectors such as garlic, four-wheeled vehicle tires, poultry, beef import, and price fixing for motorbikes. All of such cartel cases were initiated through KPPU investigations, with the exception of bid rigging cases which were generally based on reports from the public. In handling such cases, KPPU determines whether there has been a violation in the form of a cartel agreement, which is subject to a fine of not less than IDR1 billion and not more than IDR25 billion. KPPU's decision is final and binding to the extent that there is no appeal filed with the District Court and no cassation is filed with the Supreme Court.

The mechanism for proving cartels by using circumstantial (indirect) evidence consists of proof of communication and economic proof, whereby such proving mechanism has frequently raised sharp debate among practitioners and legal

[24]Daren Shiau and Elsa Chen, *Op. Cit.*, p.150.

[25]Jiajie He, "Normative Power in the EU and ASEAN: Why They Diverge", *International Studies Review* (2016) 18, p. 92.

[26]Article 22 of Law No. 5/1999 provides that "Business actors shall be prohibited from conspiring with other parties with the aim of determining the awardees of tenders which may cause unfair business competition." [Unofficial translation]

observers.[27] In almost all of the cartel cases handled by KPPU cartel agreements are proven using circumstantial evidence, as no written agreement has been found in any of them. The difficulty in finding cartel agreements is due to the fact, among other things, that KPPU lacks the authority to seize or search related documents or correspondence. In addition to that, Law No. 5/1999 does not provide for leniency program which would enable cartel perpetrators to confess their actions by obtaining whistle-blower immunity in return for their willingness to provide information and data about the ongoing cartel activities. The proposal for amendment of provisions on KPPU's authority to conduct investigation and to grant relief through the leniency program in its capacity as the adjudicating institution, as well as the amount of administrative fines is currently in the process of being considered by the House of Representatives of the Republic of Indonesia. Up to the present time, Indonesia is still "wrestling" with cartels and all of the risks involved, as cartels are generally perpetrated by large companies or companies that possess facilities through government regulation.

Competition provisions in Thailand are set out in The Trade Competition Act B.E 2542 enacted in 1999 (Competition Act, B.E. 2542). Cartel practices are explicitly prohibited in Section 25 and Section 27. Section 25 prohibits agreements for price fixing, both for predatory pricing as well as excessive pricing, barrier to entry, and other acts restring trade. At the same time, Section 27 prohibits price fixing as well as fixing the volume of sales and/or purchases, the division of market territory, as well as bid rigging. The competition authority is the Office of Competition Commission (hereinafter referred to as OCC) established at the Ministry of Trade, which has the authority to give recommendations, notifications, to summon related parties for clarification, to consider pressing criminal charges based on reports by parties suffering damage as a result of unfair competition practices.[28] The above described function is implemented by the Commission and the Appeal Committee or Sub-Committee appointed by the OCC. Upon the instruction of the OCC, appeals must be filed with the Appeals Committee by the relevant parties within thirty days as from the date of being notified about such instruction of the OCC. The Appeals Committee is required to set forth the rules and procedure for appeals in the Government Gazette).

Provisions on the prohibition of cartels in Vietnam are set forth in the Law on Competition adopted by Parliament on December 3, 2004, which came into effect as from July 1, 2005. It was subsequently followed by the issuance of several implementing regulations in the form of Government Regulations. Provisions for the prohibition of agreements in restraint of competition are set out in Article 8 and Article 9. The competition authority in Vietnam is the Administrative Body for Competition (hereinafter referred to as ABC) which has the authority to oversee market concentration, to receive jurisdiction for exceptions, to investigate competition cases related to practices restraining competition and unfair competition practices, to impose fines, and to undertake other actions in accordance with applicable law.[29] Another relevant institution is the Competition Council (hereinafter referred to as CC), namely a body set up by the government consisting of 11-15 members appointed and dismissed by the Prime Minister at the recommendation of the Minister of Trade.[30] The Chairperson of CC makes a decision on the formation of a tribunal for handling

[27] KPPU Regulation Number 4 Year 2011 concerning Guidelines on Article 5 (Price Fixing).
[28] See Section 18 of Competition Act, B.E. 2542.
[29] Article 49 of the Competition Law of Vietnam.
[30] Article 53 of the Competition Law of Vietnam.

competition cases, which consists of not less than five CC members, one of which is to preside over the investigation proceeding for resolving competition cases.

The competition authority of Singapore based on the Competition Act is the Competition Commission of Singapore (CCS) which has the capacity to sue or to be sued in cases of unfair competition. The main function of the CCS is to promote efficient market behavior, by maintaining productivity and competitive culture, raising awareness among government agencies concerning competition policy, as well as other functions including perform such other functions and discharge such other duties as may be conferred on the Commission by or under any other written law.[31] There are explicit provisions prohibiting cartels in Article 34 which in principle prohibits concerted practices for fixing prices or sales, controlling production or supplies, engage in discriminatory conduct in business transactions and in unfair trade practices.

Cartel and bid rigging prohibitions in Malaysia are set out in Part II concerning Anti Competitive Practices, Chapter I concerning Anti Competitive Agreements, Clause (Article) 4 concerning the Prohibition of Horizontal and Vertical Agreements of Act 712 Competition Act 2010. As for the investigation process, it is provided for in Part III concerning Investigation and Enforcement, Clause 14 up to Clause 34. Provisions on the competition authority are set out in Part IV concerning The Malaysian Competition Commission (hereinafter referred to as MyCC), while Part V provides for the Competition Appeal Tribunal. MyCC has the authority to conduct investigation and to determine whether the Competition Act 2010 has been violated, being subject to a fine of not more 10% of the company's overall turnover during the period in which such violation occurred.[32] The said Act also provides for leniency program in the form of punishment leniency for perpetrators of cartel by reducing the fine up to 100% of the fine/penalty that should have been originally imposed. Such leniency is granted if the relevant party is willing to cooperate in identification and investigation from the time at which the violation of the Act is found.

Similar to Malaysia's competition provisions, Brunei Darussalam has also adopted competition regulations under the Constitution of Brunei Darussalam (Order Made under Article 83(3) Competition Order, in 2015. Prohibited agreements are provided for in Chapter II including agreements restraining or distorting competition. The said law also provides for leniency program.

Myanmar began the process of adopting competition rules under The Competition Law (The Pyidaungsu Hluttaw Law No.9, 2015) The 7th Waxing Day of Taboung, 1376 M.E (February 24, 2015). The competition authority in Myanmar is the Myanmar Competition Commission which consists of "an appropriate person of Union level as a Chairman, professionals and suitable persons from the relevant Union Ministries, government departments, government organizations and nongovernmental organizations as members…". The powers of the Myanmar Competition Commission is provided for in Chapter V concerning the Power and Duties of The Commission, which basically consists of engaging in cooperation and coordination internationally, in regional organizations or bilateral relations concerning competition matters, applying exceptions for the interest of the state or small and medium enterprises, forming committees and working groups, determining market share and the volume of supply of companies under investigation, conducting

[31]Article 6 of the Competition Act of 2004, Functions and Duties of Commission.
[32]Clause 40 of Finding of an Infringement of Competition Act 2010.

investigation and collecting instruments of evidence, summoning the parties concerned and conducting discussions with experts, seizing documents as evidence, examine documentary evidence and initiating prosecution if needed, providing leniency to perpetrators prior to pressing charges against them at court, and providing advice to the government. As for cartels, they are in principle provided for in Chapter VII concerning Act of Restraint on Competition, including price fixing for purchase as well as sale prices, agreements restraining competition, controlling production, and bid rigging.

All of the above described components are preventive measures in combating cartels in the form of laws and implementing regulations, supervisory authorities, as well as rules of procedure. The next level of such endeavors include building synergy, or at at least mutually beneficial harmonization among AMSs raising awareness of the harmful effects of cartel practices on the community.

3. Cooperation in Combating Cartels in the ASEAN Region

In the current era of trade globalization, cooperation among countries in economic regions is increasingly becoming an option, including in conducting international cartel investigations. Countries in the European economic region are one of the examples of a region progressively engaging in regional cooperation by adopting supra-national provisions based on a Treaty applicable to all member states.[33] Viewed from the aspect of historical and regulatory background in the area of competition, ASEAN is facing a rather different situation. From the legal historical point of view, competition law and policy in ASEAN Member States are highly diverse, with respect to the time of formation of law enforcement institutions and implementation of the law, the organizational structure of institutions, as well as the substantive provisions of the rules specifically prohibiting cartels.

The existing diversity of historical background and legislation raise various issues requiring harmonization of implementation at the regional level in the future. One of the central issues is the divergence of legal systems supporting enforcement and the diversity of the organizational structure of competition authorities with jurisdiction in their respective countries. Other significant risks emerging in multi-jurisdictional cases are related to the due process of law and the disclosure of confidential information.[34]

In the context of cooperation in economic regions, it is likely to be easier to build synergy in merger review as compared to joint efforts for combating cartels. It is due to the divergent nature of investigation each of the said areas entail respectively, namely the party under investigation in cartel cases is a party alleged of having violated the law, while merger review is concerned about the fulfillment of the authorization process involved. There are at least three important points that need to be duly noted in the context of joint investigations of cartels, namely as follows:

a) Application of the principle of comity or the mutual respect among countries;

[33]Article 101 of the Treaty on the Functioning of the European Union (TFEU). Market dominance, or preventing the abuse of firms' dominant market positions under Article 102 TFEU. Mergers, control of proposed mergers, acquisitions and joint ventures involving companies that have a certain, defined amount of turnover in the EU, according to the Merger Regulation.

[34]OECD, "Improving International Co-operation in Cartel Investigations", *Global Forum on Competition*, November 30, 2012, p.1.

b) Instruments used jointly, in the form of rules concerning joint cartel investigation procedure and mechanism, as well as effectiveness of the same during a specific time period;
c) The form of competition authority which possesses the powers, competence and independence to overcome the jurisdiction of other member states in implementing its authorities and functions.

The comity principle can be effectively applied through harmonization among member states in the region concerned.[35] The purpose of harmonizing the regulatory framework is to seek commonalities among the diverse legal systems of member states, subsequently taking steps to complement the same thus resulting in comprehensive regulations. For such purpose, a combined method of informal and formation cooperation among competition authorities can be adopted. Informal cooperation can include exchange of information, sharing knowledge, and strategies for investigation, witness evaluation, market information, or any other matters beneficial for streamlining and directing the investigation process.[36]

At the same time, formal cooperation can begin with memorandum of understanding setting out agreements concerning ways of handling cartels at the regional level. Many countries entering into bilateral agreements include provisions concerning the coordination of parallel investigations, exchange of information, consultations or exchange of staff between competition authorities.[37] It is then escalated to the next level in the form of rules which must be complied with by all member states. It is certainly more easily achieved when all member states already have similar regulations in place and share a common understanding of the hazards caused by cartel practices. The application of the above described method is also dependent on the availability of formal instruments in the form of regulations, interpersonal communications based on trust, knowledge of competition related issues by the competition authorities concerned, and the conditions which serve as a background for specific cases.

One of the potentially effective methods for revealing cartels within the concept of joint handling of cartel cases, although some member states may not have provided for it, is primarily the guarantee for maintaining the secrecy of information to be revealed by the applicants. With regards to the implementation of cooperation, several countries set forth the legal basis directly for cooperation among authorities or jurisdictions, while others choose to set it out in the cooperation agreement with other jurisdictions. States can also potentially adopt regulations serving as "gateway" to other competition authorities in obtaining information in the course of investigation conducted by them.

Despite the numerous success stories of cooperation among competition authorities in handling cartel cases, several challenges remain in the implementation thereof. Most national jurisdictions prohibit competition authorities from disclosing confidential information obtained from third parties in the process of investigation. Similarly, in the event of leniency applications the disclosure of such confidential information may have potential impact on the applicant's safety. Other potential challenges may arise in view of disparities in the treatment of cartel prohibitions;

[35]Mokhamad Khoirul Huda et. al., "Harmonizing Competition Law In The Asean Economic Community", *International Journal of Business, Economics and Law*, Vol. 9, April 4, 2016, p.50-51.
[36]OECD, Op. Cit., p...
[37]Ibid., p.

namely some states treat cartels as criminal acts, while other states treat cartel cases based on administrative enforcement.[38] On the other hand, competition authorities from administrative jurisdictions often find themselves in a better position to expand the methods of information cooperation. A variety of legal approaches is applied by different states; Indonesia, for instance, tends to be more inclined towards applying the rule of reason approach rather than the *per se* illegal approach.

Harmonization at the regional level of the mechanism for proving cartels, followed by the adoption of rules serving as guidelines in handling cartels is the initial stage in the process undertaken by states in a region. The rules that need to be set out first of all related to cartels include the proceedings, among other things the hearing mechanism applied by authorities in examining business actors suspected of having engaged in cartel activities, the time frame for investigation and examination which is bound to have an impact on limiting the volume of documents and exhibits used by the prosecutor and defense, the scheme of leniency program, and the amount of sanctions in the form of fines.[39]

However, even when competition authorities are in possession of the same evidence and information, the respective law enforcement agencies may end up making divergent decisions. Several countries in a certain region may appoint an institution for investigating cartels involving several competition jurisdictions. The ASEAN region, where almost all member states already have competition law instruments in place, should start thinking about the formation of such competition authority, based on common understanding, and with functions that would include the handling of cross-border cartel cases. Thus far, there has been a positive sign in the implementation of Indonesia's Law No. 5/1999 by a Singaporean business actor. In the case involving a multinational company from Singapore, the company agreed to pay the fine imposed by KPPU, the Indonesian competition authority, after KPPU's decision obtained final and binding force at the cassation level at the Supreme Court.[40]

The potential challenges emerging in the process of institutional development are related to the disparities in the powers and functions of competition authorities, the capacity of human resources, and the legal approaches used, all of which are bound to affect the performance and effectiveness of cooperation. Similar is the case with the imposition of fines, in view of the fact that some states treat cartel cases under the criminal jurisdiction, while others treat them under the administrative jurisdiction, including the execution thereof. The establishment of ASEAN economic cooperation through AEC in 2015 reinvigorated the aspiration towards unifying competition policy and law among member states of the region. The formation of the forum of ASEAN competition authorities can be considered as a milestone in such cooperation. The initial purpose of promoting competition policy has developed by adopting competition laws in all member states.

[38]Philip Lowe, "Cartels, Fines, and Due Process", *The Online Magazine for Global Competition Policy* (GCP), June 2009, Release Two, p.6.

[39]Javier Ruiz Calzado and Gianni De Stefano, "Rights of Defense in Cartel Proceedings: Some Ideas for Manageable Improvements", *Latham & Watkins - Article Reprint*, p.6-8, https://www.lw.com/thoughtLeadership/ rights-of-defense-in-cartel-proceedings, accessed January 16, 2017.

[40]OECD, *Op. Cit.*, p.194.

C. Conclusion

Based on the foregoing discussion on handling cartels in economic regions the following conclusions can be made:

1. All member states in the region have agreed to handle cartels, in view of their highly damaging impact on consumers and the barrier to entry impact on potential new entrants to the market. Member states of the ASEAN Economic Region have agreed to join efforts in combating cartels by adopting anti-monopoly legislation in their respective countries by the year 2015. Such agreement has been the embryo of cooperation in handling cartels. Harmonization efforts are bound to encounter challenges in the form of the existing divergent legal systems and approaches to cartels in the respective member states.

2. Cooperation in handling cartels in the economic region requires harmonization by developing common understanding, which can be followed up by adopting competition regulations and a supervisory authority at the regional level. There is a need for trained human resources as well as clearly articulated rules concerning the boundaries of the functions and authorities of such an institution.

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